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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 RAJU T. DAHLSTROM,

8 Plaintiff,

9 v.

10 UNITED STATES OF AMERICA, *et al.*,

11 Defendants.
12

Case No. C16-1874RSL

ORDER GRANTING IN PART THE
UNITED STATES' MOTION TO
DISMISS THE SECOND
AMENDED COMPLAINT

13 This matter comes before the Court on the "United States' Motion to Dismiss
14 Plaintiff's Second Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and
15 12(b)(6)." Dkt. # 68. The United States seeks dismissal of most of plaintiff's claims on
16 the ground that it has not waived sovereign immunity for constitutional tort claims or for
17 Bivens claims based upon constitutional violations committed by federal employees. The
18 United States also seeks dismissal of plaintiff's wrongful discharge in violation of public
19 policy claim because the supporting allegations are nothing more than a threadbare
20 recitation of the elements of the cause of action and do not specify the public policy at
21 issue. Plaintiff opposes the motion.¹

22 **A. Subject Matter Jurisdiction, Fed. R. Civ. P. 12(b)(1)**

23 As a sovereign, the United States and its agencies are immune from suit unless the
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25 ¹ This matter can be decided on the papers submitted. Plaintiff's request for oral argument is
26 DENIED.

1 immunity has been affirmatively waived. Chadd v. U.S., 794 F.3d 1104, 1108 (9th Cir.
2 2015). “Sovereign immunity is jurisdictional in nature. Indeed, the terms of the United
3 States’ consent to be sued in any court define the court’s jurisdiction to entertain the suit.”
4 Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994) (internal quotation marks and
5 alterations omitted). Congress waived the United States’ immunity with regard to state
6 tort claims through the Federal Tort Claims Act (“FTCA”). 28 U.S.C. § 1346(b)(1). The
7 waiver extends only to circumstances “where the United States, if a private person, would
8 be liable to the claimant in accordance with the law of the place where the act or omission
9 occurred.” 28 U.S.C. § 1346(b)(1). The Supreme Court has held that the reference to “the
10 law of the place” means the law of the state where the negligent or wrongful act occurred.
11 Under § 1346(b)(1), immunity is therefore waived only as to state law claims: a federal
12 constitutional or statutory tort may not be pursued directly under the FTCA. Meyer, 510
13 U.S. at 477-78. To the extent plaintiff is asserting that the United States violated the U.S.
14 Constitution and/or discharged plaintiff in violation of federal law, the FTCA does not
15 apply and the United States has not waived its immunity. Dkt. # 62 at 5-6.

16 Plaintiff’s responsive memorandum is virtually incomprehensible with regards to
17 the jurisdictional challenge. He spends twenty-one pages (a) discussing irrelevant
18 concepts related to mandamus, class actions, state and tribal sovereign immunity, wrongs
19 allegedly committed by other defendants, other tribes, and/or non-parties, a separate *qui*
20 *tam* action, declaratory relief, and trespass and (b) summarizing case law, statutes, and
21 legislative history with no effort to tie the analysis to the facts of this case or the issues
22 raised in the United States’ motion. In a one paragraph section of the memorandum
23 entitled “United States of America has waived its Sovereign Immunity,” plaintiff states:

24 The United States has waived its own and Federal Defendant’s sovereign
25 immunity to the claims herein by virtue of, without limitation, the
26 FTCA/ISDEAA and the United States fiduciary and trust obligations.
Conduct which violates the laws and Constitution of the United States, as

1 alleged herein, and thus, removes sovereign immunity as a defense under
2 the doctrine established by Exparte [sic] Young . . . , Larsen v. Domestic
3 and Foreign Commerce Corp. . . . , and Bivens V. [sic] Six Unknown
4 Named Agent [sic] of Federal Bureau of Narcotics

5 Dkt. # 73 at 21.

6 Plaintiff makes no effort to explain how the Indian Self Determination and
7 Education Assistance Act of 1975 (“ISDEAA”) effected a waiver of the United States’
8 sovereign immunity. The ISDEAA was enacted “to promote the goal of Indian self-
9 government, [reflecting Congress’] overriding goal of encouraging tribal self-sufficiency
10 and economic development.” Okla. Tax Comm’n v. Citizen Band Potawatomi Indian
11 Tribe of Okla., 498 U.S. 505, 510 (1991) (internal quotation marks and citation omitted).
12 Congress authorized the Secretary of the Interior to enter into contracts with requesting
13 tribes that would transfer federal responsibilities and their associated funding to the tribes
14 for planning, execution, and administration. 25 U.S.C. § 5321(a). Congress wanted to
15 limit the liability of tribes that agreed to these arrangements, however, so it deemed tribes,
16 their organizations, and their contractors to be federal employees while acting within the
17 scope of their employment in carrying out a self-determination contract under the
18 ISDEAA. Snyder v. Navajo Nation, 382 F.3d 892, 897 (9th Cir. 2004); 25 U.S.C.
19 § 5321(d). Any claim against a tribe or its employees arising from the performance of one
20 of these contracts is therefore an action against the United States and is subject to the
21 same sovereign immunity analysis as would have been applied had the United States been
22 named as the defendant. See Snyder, 382 F.3d at 897 (United States subjects itself to suit
23 under the FTCA for torts of tribal employees hired and acting pursuant to a self-
24 determination agreement). As discussed above, the FTCA does not waive the United
25 States sovereign immunity for federal constitutional tort claims: the ISDEAA does not
26 alter that analysis.

1 **B. Failure to State a Claim Upon Which Relief May Be Granted, Fed. R. Civ. P.**
2 **12(b)(6)**

3 The only claim asserted against the United States that may fall within the FTCA's
4 waiver of sovereign immunity is plaintiff's state law claim for wrongful discharge in
5 violation of public policy. The claim is based on the allegation that defendants' actions
6 "constituted retaliation and wrongful discharge under public policy (including federal[]
7 statutory rights and policies set forth above) and in violation of Plaintiff's rights under the
8 1st, 5th and 14th amendments to the United States Constitution." Dkt. # 63 at ¶ 125. The
9 reference to "federal[] statutory rights and policies set forth above" is so vague as to be
10 unintelligible in light of the preceding thirty pages of allegations and the thirteen federal
11 statutes, regulations, contracts, and/or policies mentioned therein. While the reference to
12 three constitutional amendments is more specific, the supporting allegations do not
13 provide enough information to give rise to a plausible inference that those rights form
14 public policy in Washington or that plaintiff's termination jeopardized that public policy.

15 In his response memorandum, plaintiff clarifies the basis of his claim, stating that
16 he was fired because he engaged in protected speech by raising concerns about dangerous
17 medical practices and fraud in the use of ISDEAA funds. The Court accepts plaintiff's
18 clarification: his retaliation and wrongful discharge claim is based upon and hereby
19 limited to alleged whistle-blowing activities regarding the medical services provided to
20 the Sauk-Suiattle Indian Tribe and fraud, waste, and abuse under the tribe's ISDEAA
21 contracts.

22 Plaintiff offers no additional information regarding his retaliation claim. The claim
23 appears to be a restatement of the First Amendment claim discussed and dismissed above.
24 Plaintiff alleges that he engaged in speech protected by the First Amendment and suffered
25 adverse consequences causally related to that speech. There is no state law or claim at
26 issue. Because the United States has not waived its immunity from claims arising under

1 federal law, including constitutional torts, this part of Claim VI fails as a matter of law.

2 With regards to the whistle-blowing claim, the United States argues that plaintiff
3 failed to identify a clear public policy that was jeopardized by his termination or to allege
4 that his whistle-blowing activities were causally related to his dismissal. Dkt. # 68 at 17.
5 Now that plaintiff has clarified the basis for his wrongful termination claim, the Court
6 disagrees. The question for the Court on a motion to dismiss is whether the facts alleged
7 in the complaint sufficiently state a “plausible” ground for relief. Bell Atl. Corp. v.
8 Twombly, 550 U.S. 544, 570 (2007). “A claim is facially plausible when the plaintiff
9 pleads factual content that allows the court to draw the reasonable inference that the
10 defendant is liable for the misconduct alleged.” Somers v. Apple, Inc., 729 F.3d 953,
11 959–60 (9th Cir. 2013). All well-pleaded factual allegations are presumed to be true, with
12 all reasonable inferences drawn in favor of the non-moving party. In re Fitness Holdings
13 Int’l, Inc., 714 F.3d 1141, 1144–45 (9th Cir. 2013). Only if the complaint fails to state a
14 cognizable legal theory or fails to provide sufficient facts to support a claim is dismissal
15 appropriate. Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir.
16 2010).

17 Plaintiff alleges that he was employed by the Sauk-Suiattle Indian Tribe as the
18 Director of its Health and Human Services Department between April and December
19 2015. In that role, plaintiff alleges that he notified certain defendants that their scheme to
20 encourage patients to apply for health coverage under the Affordable Care Act constituted
21 illegal double dipping, that he refused to falsify ISDEAA contract documentation, that he
22 lodged complaints regarding the safety and efficacy of the vaccination program offered
23 by the tribal medical clinic, that he reported a fellow medical provider for working
24 outside the scope of her license, and that he complained about violations of health and
25 safety standards related to the lack of sinks in the medical clinics. Plaintiff further alleges
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1 that he was threatened with termination if he pursued his vaccine-related investigation
2 and/or made complaints to tribal members or outside agencies. When he persisted, he was
3 placed on paid administrative leave, then terminated. Plaintiff specifically alleges that his
4 whistle-blowing activities caused his termination.

5 “In Washington, the general rule is that an employer can discharge an at-will
6 employee for no cause, good cause or even cause morally wrong without fear of liability.”
7 Ford v. Trendwest Resorts, Inc., 146 Wn.2d 146, 152 (2002) (internal quotation omitted).
8 “The tort for wrongful discharge in violation of public policy is a narrow exception to the
9 at-will doctrine . . . To state a cause of action, the plaintiff must plead and prove that his
10 or her termination was motivated by reasons that contravene an important mandate of
11 public policy.” Becker v. Cmty. Health Sys., Inc., 184 Wn.2d 252, 258 (2015). In
12 September 2015, the Washington Supreme Court issued three companion cases intending
13 to clarify the formulation of this tort. See Rose v. Anderson Hay & Grain Co., 184 Wn.2d
14 268 (2015); Becker, 184 Wn.2d 252; Rickman v. Premera Blue Cross, 184 Wn.2d 300
15 (2015). The court explained that there are four scenarios giving rise to wrongful discharge
16 in violation of public policy claims that can be “easily resolved” under the framework
17 initially articulated in Thompson v. St. Regis Paper Co., 102 Wn.2d 219 (1984). See
18 Rose, 184 Wn.2d at 286–87; Becker, 184 Wn.2d at 258–59. These scenarios, one of
19 which arises “when employees are fired in retaliation for reporting employer misconduct,
20 i.e., whistle-blowing,” do not require much analysis because they implicate clear public
21 policies. Rose, 184 Wn.2d at 286–87 (internal citation omitted); Karstetter v. King Cty.
22 Corr. Guild, 1 Wn. App.2d 822, 832 (2017).

23 Plaintiff has adequately alleged that he engaged in whistle-blowing activities in
24 order to further the public good and that he was terminated for his continuing
25 investigation of and complaints about Dr. Morlock’s provision of vaccination services at
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1 the tribal medical center and fraud in the provision of contract services under the
2 ISDEAA. The burden now shifts to the defendant to show that plaintiff's whistle-blowing
3 allegations are false or that his dismissal was for other reasons. See Rose, 184 Wn.2d at
4 287.

5 In its reply memorandum, the United States for the first time argued that the Court
6 lacks subject matter jurisdiction over the wrongful discharge claim because it does not
7 arise out of state law, relying on Delta Savings Bank v. U.S., 265 F.3d 1017 (9th Cir.
8 2001). The Court will not consider arguments raised for the first time in reply, but notes
9 that Delta Savings is easily distinguishable.²

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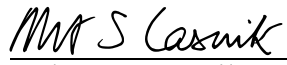
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23 ² In Delta Savings, the plaintiff asserted a negligence *per se* claim based on a violation of a
24 federal statute. The only duty at issue was imposed by federal, rather than state, law, which the Ninth
25 Circuit found dispositive. In this case, the duty to avoid terminating an employee for reasons that
26 contravene an important mandate of public policy arises under Washington law. The fact that Washington
prizes and protects both state and federal policies as needed does not convert the claim into a federal
cause of action.

1 For purposes of the motion to dismiss, the United States' motion to dismiss (Dkt.
2 # 68) is GRANTED in part and DENIED in part. The United States has not waived its
3 sovereign immunity from liability for federal constitutional torts, whether asserted
4 directly under the constitution or as a Bivens action. Claims One, IV, the retaliation
5 portion of Claim VI, and the second Claim VII are hereby DISMISSED against the
6 United States for lack of subject matter jurisdiction. The wrongful discharge portion of
7 Claim VI may proceed.

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9 Dated this 13th day of July, 2018.

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11 Robert S. Lasnik
12 United States District Judge
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